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No. 08-____

IN THE

Supreme Court of the United States

CHRISTOPHER PAVEY,
Petitioner,

v.

PATRICK CONLEY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Jones v. Bock*, 549 U.S. 199 (2007), this Court held that exhaustion of prison administrative remedies under the Prison Litigation Reform Act ("PLRA") is an affirmative defense, which must be pleaded and proved by the defendant in accordance with the usual practice under the Federal Rules of Civil Procedure. In the decision below, the Seventh Circuit nevertheless held that PLRA exhaustion is an "issue of judicial traffic control" to be litigated not under the normal procedural rules, but instead in accordance with a special preliminary procedure by which a court resolves the affirmative defense—including any underlying factual disputes about its application—before discovery or any other litigation on the merits of a claim may proceed.

The following question is presented:

When the defendant in an action for damages governed by the PLRA invokes the statutory affirmative defense of exhaustion, is the defense to be litigated under the usual rules of procedure applicable to affirmative defenses, including trial by jury to resolve disputed factual issues underlying the defense?

PARTIES TO THE PROCEEDING BELOW

Pursuant to Rule 14.1(b) of the Rules of this Court, petitioner states as follows:

Petitioner Christopher Pavey was plaintiff in the district court and appellee in the court of appeals.

Respondents Patrick Conley, Robert Watts, Laurence Grott, and Javadis Beaty were defendants in the trial court and appellants in the court of appeals. A fifth defendant in the trial court, Casiano (first name unknown), was not served with process and a sixth, Shepard (first name unknown), has not appeared in this action.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Christopher Pavey respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The amended opinion of the United States Court of Appeals for the Seventh Circuit (App. 1a) is published at 544 F.3d 739 (7th Cir. 2008). The Order denying rehearing and rehearing en banc (App. 36a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on June 5, 2008. The court of appeals denied rehearing and rehearing en banc on September 12, 2008. App. 36a. Justice Stevens granted petitioner's application for an extension of time until January 12, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Seventh Amendment to the U.S. Constitution provides:

> In Suits at common law, where the value of the controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Title 42, § 1997e of the U.S. Code states in pertinent part:

> **§ 1997e. Suits by prisoners**
>
> (a) Applicability of administrative remedies
>
> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

STATEMENT OF THE CASE

As the district court correctly recognized, this case presents a recurring question with a "far-reaching impact on prisoner litigation" (App. 10a): Is the statutory affirmative defense of exhaustion in the Prison Litigation Reform Act ("PLRA") to be litigated like any other legal affirmative defense, under normal rules of procedure and with disputed facts to be resolved by a jury at trial? The district court answered that question in the affirmative, but the Seventh Circuit reversed. It held that exhaustion is a quasi-jurisdictional "issue of judicial traffic control," such that judges must resolve the affirmative defense—including any factual disputes about its application—in a preliminary fashion before the parties may proceed with discovery and litigation on the merits of a claim. App. 4a. To resolve exhaustion on this threshold basis, the court of appeals mandated an elaborate special procedure distinct from the usual Federal Rules governing federal-court litigation.

The court of appeals' conclusion cannot be reconciled with this Court's recent decision in *Jones v. Bock*, 549 U.S. 199 (2007), which holds that exhaustion in the PLRA is an affirmative defense to be governed by the usual practice under the Federal Rules of Civil Procedure. The decision also conflicts with multiple decisions of this Court and others concerning the adjudication of affirmative defenses in federal-court actions at law.

While exacerbating conflicts that are already wide and spreading, the error in the Seventh Circuit's decision is nevertheless so clear, and the resolution so simple, that a summary reversal may be in order in lieu of plenary review. This Court could summarily pronounce that, rather than the complicated procedure adopted by the decision below, the PLRA exhaustion defense is to be tried like any other legal defense, in accordance with normal rules of procedure, and ultimately subject to a jury trial when necessary to resolve disputed factual issues bearing on exhaustion. If the case warrants consideration beyond that simple resolution, certiorari should be granted and the case set for full briefing and argument.

A. Factual Background

Petitioner Christopher Pavey is an Indiana state prisoner. On October 14, 2001, prison guards at the Maximum Control Facility in Westville, Indiana ("MCF"), broke his arm during a cell extraction. Petitioner was isolated in his cell following the extraction; it was not until the next day that prison staff responded to his repeated requests to speak about the incident to a prison official, who told petitioner

that he "would check into it." App. 25a. Later that day, petitioner was taken to another prison where he received medical treatment. When petitioner returned to MCF, two prison officials interviewed him about the events of the previous day and photographed his arm. Petitioner was then returned to his cell and isolated. Four days later, petitioner was transferred to a hospital in Indianapolis, where a doctor surgically repaired his broken arm with a metal plate and screws. A week after the surgery, petitioner was transferred to Pendleton Correctional Facility.

During this period, petitioner could not write because of his broken arm, but he grieved to "anyone who would listen" about his treatment by respondents. App. 29a. In January 2002, as soon as his arm healed and he was able to write, petitioner filed a written grievance about the cell extraction. *Id.* The grievance was rejected on the stated ground that it should have been filed at MCF, within 48 hours after the incident.

B. Proceedings Below

1. Petitioner, proceeding *pro se*, brought this suit against respondents—the prison guards who broke his arm—seeking damages under 42 U.S.C. § 1983. After the initial screening required by the PLRA, *see* 28 U.S.C. § 1915A(a), (b), the district court allowed petitioner to proceed on a claim that respondents used excessive force during the cell extraction. Respondents answered the complaint and admitted that a forceful extraction took place, but they asserted the affirmative defense that petitioner failed to exhaust his available administrative remedies be-

fore filing suit as required by the PLRA, 42 U.S.C. § 1997e(a). Respondents moved for summary judgment on their affirmative defense, asserting that because there was no grievance on file at MCF, petitioner must not have exhausted his administrative remedies. The district court agreed and granted summary judgment.

2. The court of appeals reversed. It held that the record reflected genuine disputes of material fact over whether petitioner exhausted his administrative remedies in accordance with prison procedures. App. 23a-24a. Summary judgment was improper for three reasons, the court explained.

First, the prison's grievance procedures "specifically allow[ed] inmates who cannot write to get . . . a staff member to assist them in preparing grievances." App. 30a. It was "undisputed" that petitioner could not physically write during the 48-hour grievance period because of his broken arm and because he was locked in his cell. App. 31a. Thus, "[i]f there was to be a written grievance, then it had to be written for Mr. Pavey by the officers who interviewed him." *Id.* Under the prison's procedures, "[he] did not have to write it himself; he did not have to review it; and he did not have to sign it." *Id.* Accordingly, so long as the officers who interviewed him "memorialized" his "oral account of the cell extraction," then petitioner may well have "literally satisf[ied]" the required procedure. *Id.* And because respondents failed to show that his complaints were never reduced to writing, summary judgment was premature. *Id.*

Second, there was a factual dispute as to whether petitioner "reasonably believed that he had done all that was necessary to comply" with the grievance procedure. "[I]nmates may rely on the assurances of prison officials when they are led to believe that satisfactory steps have been taken to exhaust administrative remedies," the court held, and there was a genuine factual dispute over whether petitioner had reasonably relied on assurances "that his excessive-force allegations would be investigated." App. 34a.

Finally, the court of appeals held that a factual dispute existed concerning the availability of the grievance procedure. "[W]hen inmates cannot comply with [a] grievance procedure without essential help from prison officials and that assistance is withheld, the failure of the officials to facilitate the grievance process effectively renders administrative remedies unavailable." App. 34a. Because petitioner was injured and isolated during the grievance period, the affirmative defense of failure to exhaust would be irrelevant if the record showed that respondents gave him "no assistance in creating what would otherwise qualify as a written grievance." *Id.* And respondents failed to establish the lack of any genuine factual question as to their efforts to facilitate petitioner's compliance with the grievance procedure. *Id.*

For the foregoing reasons, the court concluded, respondents "did not establish the absence of material issues of fact concerning the exhaustion question." App. 35a. Accordingly, the court of appeals vacated the summary judgment and remanded the

case "for further proceedings on Mr. Pavey's excessive-force claim." *Id.*

3. Upon remand to the district court, petitioner sought and was granted a jury trial on his damages claims under 42 U.S.C. § 1983. *See City of Monterey v. Del Monte Dunes, Ltd.*, 526 U.S. 687 (1999) (recognizing right to jury trial on damages claims under § 1983). Respondents argued, however, that before proceeding with discovery on the merits, the court should hold a hearing to resolve for itself the disputed factual questions concerning respondents' exhaustion affirmative defense. The district court declined to do so. The court acknowledged that respondents "retain[ed] their exhaustion affirmative defense (along with any other affirmative defenses that were properly raised)," but observed that "the place for presenting those defenses is to the jury, and the time for doing so is after the plaintiff has rested his case in chief." App. 20a.

Respondents sought reconsideration of the ruling, arguing that the exhaustion affirmative defense was properly tried to the court rather than the jury, and that resolution of the exhaustion issue should precede discovery and trial of the merits. The district court denied respondents' motion. The "presumption is that fact questions are resolved by juries," the court held, and nothing in the PLRA deprives a plaintiff in a § 1983 damages action of his right to a jury trial on the exhaustion affirmative defense. App. 14a. And the court reiterated that the "time for presenting affirmative defenses to the jury is no different in this case than it is in any other: after the plaintiff has rested his case in chief." App. 16a.

Respondents then moved the district court to certify this series of orders for interlocutory appeal under 28 U.S.C. § 1292(b). The district court noted that the Indiana Attorney General, counsel for respondents, had made the same arguments regarding exhaustion "unsuccessfully in several cases" but agreed to certify its orders for interlocutory appeal because of "the far-reaching impact on prisoner litigation that these new interpretations would impose." App. 10a.

4. The court of appeals reversed. It held that whenever exhaustion is contested, a judge must resolve genuine disputed facts about the affirmative defense in a preliminary hearing before litigation may proceed. The court of appeals explained that "[j]uries decide cases, not issues of judicial traffic control," and that "[u]ntil the issue of exhaustion is resolved, the court cannot know whether it is to decide the case or the prison authorities are to." App. 4a. Thus, the court of appeals concluded, just as juries do not decide factual disputes relevant to jurisdiction, they also do not decide factual disputes about the PLRA's exhaustion provision. And unless resolution of exhaustion precedes all discovery and litigation of the merits, "the statutory goal of sparing federal courts the burden of prisoner litigation until and unless the prisoner has exhausted his administrative remedies will not be achieved." App. 7a. But because the "traffic control" theory of exhaustion is not reflected in any specific rule of federal procedure, the court of appeals articulated a novel, three-step "sequence" for resolving an exhaustion defense in a preliminary proceeding by the court before any litigation on the merits may proceed:

> (1) The district judge conducts a hearing on exhaustion and permits whatever discovery relating to exhaustion he deems appropriate. (2) If the judge determines that the prisoner did not exhaust his administrative remedies, the judge will then determine whether (a) the plaintiff has failed to exhaust his administrative remedies, and so he must go back and exhaust; (b) or, although he has no unexhausted administrative remedies, the failure to exhaust was innocent . . . and so he must be given another chance to exhaust (provided that there exist remedies that he will be permitted by the prison authorities to exhaust, so that he's not just being given a runaround); or (c) the failure to exhaust was the prisoner's fault, in which event the case is over. (3) If and when the judge determines that the prisoner has properly exhausted his administrative remedies, the case will proceed to pretrial discovery, and if necessary a trial, on the merits; and if there is a jury trial, the jury will make all necessary findings of fact without being bound by (or even informed of) any of the findings made by the district judge in determining that the prisoner had exhausted his administrative remedies.

App. 6a. The court of appeals acknowledged that in cases, like petitioner's, where the affirmative defense shares disputed facts with the underlying substantive claim, a preliminary determination of exhaustion by the court might interfere with the jury's fact-finding role. But it answered this concern by holding that whatever factual findings the judge makes

about exhaustion (so long as the judge finds exhaustion), the jury will simply "reexamine[]" at trial any relevant findings on the merits "without being bound by (or even informed of) any of the findings made by the district judge." App. 5a-6a.

5. Petitioner filed a timely petition for rehearing with suggestion of rehearing en banc. The court of appeals denied the petition but amended a portion of its opinion to permit limited discovery of factual issues related to both exhaustion and the merits. App. 6a. Upon remand, the district court referred the case to a magistrate judge for an evidentiary hearing on respondents' affirmative defense but stayed the proceedings pending review by this Court. This petition followed.

REASONS FOR GRANTING THE WRIT

The Prison Litigation Reform Act ("PLRA") provides that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner . . . until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). This provision has been a frequent subject of litigation since its enactment, and this Court has granted certiorari on numerous occasions to resolve controversies—and provide guidance to lower courts—concerning its interpretation and application. *See Booth v. Churner*, 532 U.S. 731 (2001) (granting review to address whether exhaustion is mandatory regardless of the relief sought); *Porter v. Nussle*, 534 U.S. 516 (2002) (granting review to address whether exhaustion is required of all causes of action); *Woodford v. Ngo*, 548 U.S. 81 (2006) (granting review to address

whether the PLRA requires "proper" exhaustion); *Jones v. Bock*, 549 U.S. 199 (2007) (granting review and reversing several judicially-imposed rules "designed to implement [the] exhaustion requirement and facilitate early judicial screening" of prisoner complaints).

This case presents yet another important question concerning the PLRA's exhaustion requirement meriting review by this Court. As elaborated below, there is substantial disarray in the lower courts over the question whether the exhaustion requirement—which is a mandatory element, albeit one on which the defendant bears the burden of pleading and proof—must be adjudicated by a jury in a damages action, or whether the court can decide the issue for itself in a preliminary "screening" proceeding. Although the disarray is already broad and continually deepening, the resolution is so clear and simple that plenary consideration of the case may not even be warranted. The decision below is flatly irreconcilable with multiple precedents of this Court and others holding that a substantive legal defense to a damages claim, no less than a substantive affirmative element of the claim itself, must be tried according to normal rules of procedure and, where factual disputes remain, resolved by a jury upon proper demand. This Court could summarily reverse the decision below on the basis of those precedents and hold that the affirmative defense of exhaustion under the PLRA is subject to the same pre-trial and trial procedures as is any other legal defense under the Federal Rules of Civil Procedure. That result would still permit summary, threshold adjudication of the exhaustion defense where appropriate in accordance

with the usual pleading and summary judgment rules, but without overriding the Federal Rules and creating an entirely new procedure for preliminary adjudication of the defense, as the decision below mandates.

Whether summary reversal is appropriate or not, certiorari should be granted.

I. THE DECISION BELOW CONFLICTS WITH MULTIPLE PRECEDENTS GOVERNING THE ADJUDICATION OF AFFIRMATIVE DEFENSES

A. Exhaustion Of Prison Remedies Under The PLRA Is A Substantive Legal Defense Subject To Normal Pleading And Proof Procedures

1. The PLRA was enacted in response to concerns that the federal courts were being swamped by too many non-meritorious prisoner lawsuits, which threatened to "submerge and effectively preclude consideration of [prisoner lawsuits] with merit." *Jones*, 549 U.S. at 203. To ensure that meritorious claims were not being lost in the flood, the PLRA included "reforms designed to filter out the bad claims and facilitate consideration of the good." *Id.* at 204.

The PLRA accomplishes that objective through two distinct means. First, the PLRA includes specific "judicial screening" requirements, which mark a "fundamental" departure from "the usual procedural ground rules." *Id.* at 212. The PLRA requires courts to screen prisoner complaints "before docketing, if feasible or ... as soon as practicable after docketing," and to dismiss a complaint if the

court determines that the complaint is "frivolous, malicious . . . fails to state a claim upon which relief may be granted" or "seeks monetary relief from a defendant who is immune from such relief." 28 U.S.C. § 1915A(a), (b). All these inquires are conducted by the court even "before any responsive pleading is filed—unlike in the typical civil case, defendants do not have to respond to a complaint covered by the PLRA until required to do so by the court, and waiving the right to reply does not constitute an admission of the allegations in the complaint." *Jones*, 549 U.S. at 214 (citing 42 U.S.C. § 1997e(g)(1), (2)).

Second, the PLRA requires plaintiffs to exhaust their prison grievance procedures before filing an action challenging any aspect of prison treatment or conditions. *See* 42 U.S.C. § 1997e(a). As this Court emphasized in *Jones*, the exhaustion requirement is *not* among or akin to the specific "judicial screening" requirements described above and set forth elsewhere in the statute. 549 U.S. at 214. In the PLRA, Congress "provided for judicial screening and *sua sponte* dismissal of prisoner suits" on four specific grounds, but "failure to exhaust was *notably not added in terms to this enumeration*." *Id.* (emphasis added); *see id.* at 216 (noting "the failure of Congress to include exhaustion in terms among the enumerated grounds justifying dismissal upon early screening"). Instead, exhaustion serves several distinct functions apart from screening out meritless complaints: it "improve[s] the quality of suits that are filed by producing a useful administrative record," *id.* at 204; it "provides prisons with a fair opportunity to correct their own errors," *Woodford*, 548 U.S. at 94; and it "reduces the quantity of prisoner suits

because some prisoners are successful in the administrative process, and others are persuaded by the proceedings not to file an action in federal court," *id.* Because exhaustion is not among the specified grounds for threshold screening and dismissal of a case, and because it serves important functions apart from such screening, courts are not allowed to employ the unusual procedures necessary "to facilitate judicial screening of complaints," but instead must adjudicate exhaustion under the PLRA according to "normal pleading rules." *Id.*; *see also Denton v. Hernandez*, 504 U.S. 25, 32 (1992) (*in forma pauperis* screening provisions "cannot serve as a fact-finding process for the resolution of disputed facts").

2. In *Jones*, this Court applied that analysis of the PLRA's exhaustion requirement to conclude that the requirement is an affirmative defense to be pleaded and proved by the defendant according to the normal procedures governing affirmative defenses, *not* an issue to be pleaded by the plaintiff and reviewed under special screening procedures. *Id.* at 213-16. Exhaustion is "typically" regarded as an affirmative defense, the Court explained, and nothing in the PLRA suggested that it was to be treated differently in cases falling within its scope. Indeed, the Court viewed the PLRA's silence on the question as "strong evidence that the usual practice should be followed, and the usual practice under the Federal Rules is to regard exhaustion as an affirmative defense." *Id.* at 212.

Some courts prior to *Jones* had held that the PLRA's screening mechanism would operate more effectively if exhaustion were treated as the plain-

tiff's burden so that it could be addressed summarily by the court; for example, plaintiffs could be required to attach documentary proof of exhaustion to their complaints, or to plead facts establishing exhaustion with specificity. *Id.* at 202, 205. The *Jones* Court, however, rejected those policy arguments as a basis for treating exhaustion under the PLRA differently from exhaustion in any other context. "[C]ourts should generally not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns," the Court emphasized, *id.* at 213, and "[g]iven that the PLRA does not itself require plaintiffs to plead exhaustion, such a result must be obtained by the process of amending the Federal Rules, and not by judicial interpretation," *id.* at 217 (quotation omitted). The Court returned to the same theme in the conclusion of its opinion, admonishing lower courts construing and applying the PLRA's exhaustion affirmative defense:

> We are not insensitive to the challenges faced by the lower federal courts in managing their dockets and attempting to separate, when it comes to prisoner suits, not so much wheat from chaff as needles from haystacks. We once again reiterate, however . . . that adopting different and more onerous pleading rules to deal with particular categories of cases should be done through established rulemaking procedures, and not on a case-by-case basis by the courts.

Id. at 224.

B. Numerous Precedents Hold That Factually Disputed Affirmative Defenses Must Be Resolved By The Jury, Not The Court, Contrary To the Decision Below

1. As a general matter, claims—like petitioner's—seeking damages under 42 U.S.C. § 1983 are subject to the Seventh Amendment and thus must be tried by a jury upon proper demand by either party. *City of Monterey v. Del Monte Dunes, Ltd.*, 526 U.S. 687 (1999). And it is generally recognized that "once the right to a jury trial attaches to a claim, it extends to all factual issues necessary to resolving that claim." *Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147, 170 (2d Cir. 2001). An affirmative defense, in turn, is equivalent to an element of a claim, except it is one for which the defendant bears the burden of proof. *See Jazzabi v. Allstate Ins. Co.*, 278 F.3d 979, 984 (9th Cir. 2002) ("[E]lements and affirmative defenses are co-equal components of the jury's liability determination: Liability cannot be established until after the jurors unanimously agree that the elements are satisfied and they unanimously reject the affirmative defenses."); 9 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2304 (3d ed. 1998) ("Unfortunately, there is a misconception in some quarters that the right to a trial by jury attaches because of the legal nature of a 'claim,' and does not attach to 'defenses.'").

Accordingly, this Court and many others have held that where a plaintiff's claim is subject to a jury trial, any legal affirmative defense to that claim must also be tried to a jury. *See, e.g., Byrd v. Blue*

Ridge Rural Elec. Coop., 356 U.S. 525, 538 (1958) (statutory immunity); *United States v. Duncan*, 850 F.2d 1104, 1117 (6th Cir. 1988) (reliance on the advice of counsel), *overruled on other grounds by Schad v. Arizona*, 501 U.S. 624 (1991); *Nike, Inc. v. "Just Did It" Enterprises*, 6 F.3d 1225, 1233 (7th Cir. 1993) (affirmative defense of parody in a trademark case); *Kaplan v. Exxon Corp.*, 126 F.3d 221, 225 n.2 (3d Cir. 1997) (assumption of risk); *Siler-Khodr v. Univ. of Texas Health Sci. Ctr. San Antonio*, 261 F.3d 542, 548-49 (5th Cir. 2001) (defense to Title VII); *Intrastate Gas Gathering Co. v. Dow Chemical Co.*, 248 F.3d 1140 (5th Cir. 2001) (per curiam) (waiver); *Waco Int'l, Inc. v. KHK Scaffolding Houston, Inc.*, 278 F.3d 523, 534 (5th Cir. 2002) (fair use affirmative defense to trademark infringement claim); *Tri County Indus., Inc. v. District of Columbia*, 200 F.3d 836, 840 (D.C. Cir. 2000) (failure to mitigate); *Europlast, Ltd. v. Oak Switch Sys.*, 10 F.3d 1266 (7th Cir. 1993) (insolvency in a contract and tort case); *Chocallo v. IRS*, 2007 WL 2071880, at *5 (E.D. Pa. July 17, 2007) (statute of limitations and exhaustion requirements under 26 U.S.C. § 7433).[1]

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[1] This rule arguably does not apply to affirmative defenses sounding in equity, but even the cases articulating that caveat presuppose that affirmative defenses at law must be tried to the jury. *See Liberty Oil Co. v. Condon Nat'l Bank*, 260 U.S. 235, 242 (1922) ("Where an equitable defense is interposed to a suit at law, the equitable issue raised should first be disposed of as in a court of equity, and then, if an issue at law remains, it is triable to a jury."); *Granite State Ins. Co. v. Smart Modular Techs., Inc.*, 76 F.3d 1023, 1027 (9th Cir. 1996) ("A litigant is not entitled to have a jury resolve a disputed affirmative defense if the defense is equitable in nature."). PLRA exhaustion

One of the most common affirmative defenses that courts have held must be tried to a jury is a statute of limitations. When there are disputed issues of material fact on a statute of limitations defense, courts have uniformly held that such issues must be tried to the jury with the rest of the claim. *See Meléndez-Arroyo v. Cutler-Hammer de P.R. Co.*, 273 F.3d 30, 38 (1st Cir. 2001); *Bertha Building Corp. v. Nat'l Theatres Corp.*, 248 F.2d 833, 835-36 (2d Cir. 1957); *Fowler v. Land Mgmt. Groupe, Inc.*, 978 F.2d 158, 162 (4th Cir. 1992); *Chambliss v. Simmons*, 165 F. 419, 423 (5th Cir. 1908); *Horn v. A.O. Smith Corp.*, 50 F.3d 1365, 1370 (7th Cir. 1995); *United States v. Edwards*, 968 F.2d 1148, 1153 (11th Cir. 1992).

The statute of limitations example is significant because this Court in *Jones* specifically analogized the PLRA exhaustion defense to the typical statute of limitations defense. As the *Jones* Court observed, statutes of limitations "are often introduced by a variant of the phrase 'no action shall be brought'"—the same phrase that introduces the PLRA exhaustion requirement. 549 U.S. at 215, 220. Other courts have emphasized this analogy as well. *See Johnson v. Johnson*, 385 F.3d 503, 516 n.7 (5th Cir. 2004); *Ray v. Kertes*, 285 F.3d 287, 293 (3d Cir. 2002); *Casanova v. Dubois*, 304 F.3d 75, 78 n.3 (1st

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is mandated by statute and thus is resolved solely according to law and facts; it involves no exercise of equitable discretion by the Court and requires no weighing of equitable factors. *See Woodford*, 548 U.S. at 85 ("Exhaustion is no longer left to the discretion of the district court, but is mandatory.").

Cir. 2002); *Perez v. Wisconsin Dep't of Corr.*, 182 F.3d 532, 536 (7th Cir. 1999).

Under the foregoing precedents, it is perfectly clear that disputed facts underlying a PLRA exhaustion defense in a § 1983 damages action must be adjudicated by the jury, not resolved by the court in a summary preliminary proceeding.

2. The decision below cannot be reconciled with the fundamental rules reflected in the foregoing precedents.

The analytical heart of the Seventh Circuit's opinion is its contention that PLRA exhaustion should not be adjudicated like statutes of limitations or other typical legal defenses because the PLRA treats exhaustion as a matter of "judicial traffic control." App. 4a. It is thus akin to jurisdiction and venue, which are matters resolved by the court at the threshold of the case, not by the jury as it addresses the merits. App. 3a; *see also Owens v. Blagojevich*, 2008 WL 4792707, at *1 n.2 (S.D. Ill. Oct. 29, 2008) (*Pavey* "requir[es] the district court to conduct a hearing to determine whether it has proper jurisdiction over a prisoner's claims by resolving the exhaustion issue *before* ruling on the merits"). Accordingly, the decision concludes, the court can and must resolve disputed PLRA exhaustion disputes for itself, before allowing the parties to proceed with litigation on the merits of the prisoner's claim. This is wrong, and irreconcilable with this Court's precedents, in at least three respects.

a. To start, this Court has squarely held that "the PLRA exhaustion requirement is *not* jurisdictional," and that courts indeed may reach the merits

of claims before addressing potentially difficult exhaustion issues. *Woodford*, 548 U.S. at 101 (emphasis added). The Seventh Circuit's holding that exhaustion *must* be litigated and resolved before litigation on the merits may proceed conflicts directly with this holding of *Woodford*. And the court's flawed analogy to jurisdiction—shown to be erroneous by *Woodford*—leads inexorably to the flawed conclusion that, like disputed facts underlying jurisdictional issues, disputed facts underlying a PLRA exhaustion defense can be taken from the jury and resolved by the court. While it is true that, as this Court has explained, "in some instances, if subject-matter jurisdiction turns on contested facts, the trial judge may be authorized to review the evidence and resolve the dispute on her own," it is equally true that where "satisfaction of an essential element of a claim for relief is at issue . . . *the jury is the proper trier of contested facts*." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006) (emphasis added). As shown above, it is the latter rule, not the former, that obtains here: the PLRA makes exhaustion an essential element of a claim for relief in a prisoner suit under § 1983, *see Jones*, 549 U.S. at 211, though it operates to bar relief only when the defendant carries the burden of negating the element, *id.* at 211-12. Accordingly, the jury must be "the proper trier of contested facts" bearing on exhaustion.

The court's analogy to venue is flawed for the same reason. A court may resolve disputed facts related to venue precisely because venue is "*unlike* . . . affirmative defenses such as contributory negligence," in that venue "does not bear upon the substantive right to recover." *American Dredging Co. v.*

Miller, 510 U.S. 443, 454 (1994) (emphasis added). Because proof of exhaustion vel non bears directly upon a prisoner's right to recover under § 1983, contested facts concerning exhaustion can be resolved only by the jury.

Unlike jurisdiction and venue, affirmative defenses—including exhaustion—are not subject to resolution by preliminary procedures. *See* Fed. R. Civ. P. 12(i) (limiting preliminary hearings to those defenses listed in Rule 12(b) and motions under Rule 12(c)); 5C Wright & Miller, *supra*, § 1373 ("[Rule 12(i)] only authorizes a preliminary hearing for the Rule 12(b) defenses and for a motion under Rule 12(c) . . . . [It] cannot be used . . . to adjudicate other matters, such as affirmative defenses."). Unless decided on the pleadings alone—as where, for example, the complaint's own allegations establish the defense, *see Jones*, 549 U.S. at 215—an affirmative defense must be tested at summary judgment, *see* Fed. R. Civ. P. 12(d), 56(b), with factual disputes underlying the defense reserved for trial, *see* 5 Wright & Miller, *supra*, § 1277. The decision below departs dramatically from those basic procedures, contradicting the Federal Rules, this Court's decisions in *Jones* and *Woodford*, and the Seventh Amendment's protection of the right to trial by jury of material factual disputes in actions at law.

b. This Court in *Jones* also squarely rejected the central premise of the decision below, *viz.*, that the PLRA exhaustion defense is merely a matter of "judicial traffic control," employed by courts solely as a threshold screen to determine "whether [the court] is to decide the case or the prison authorities are to."

App. 4a. In contrast to that analysis, the Court in *Jones* repeatedly noted "the *failure* of Congress to include exhaustion in terms among the enumerated grounds justifying dismissal upon early screening." *Id.* at 216 (emphasis added); *see id.* at 214 (same). Exhaustion differs from a mere judicial traffic control device, the Court explained, because it serves the more substantive purposes of creating an administrative record useful for litigation. *Id.* at 204. For these reasons, the Court concluded, exhaustion *must* be adjudicated according to the "normal pleading rules," rather than special preliminary screening procedures. *Id.* And as just shown, the "normal pleading rules" require that affirmative defenses be treated like substantive claim elements, to be analyzed successively on the complaint's allegations at the pleading stage, on the record facts viewed most favorably to the non-movant at summary judgment, and on the disputed factual record by the jury at trial. *See supra* at 16. The Seventh Circuit's holding that special preliminary procedures for adjudicating exhaustion are permissible and appropriate to serve the judicial traffic control function of exhaustion cannot be reconciled with *Jones*. *See Bryant v. Rich*, 530 F.3d 1368, 1380 (11th Cir. 2008) (Wilson, J., concurring in part, dissenting in part) (stating "I do not think [a preliminary proceeding to resolve factual PLRA exhaustion disputes judicially] can be reconciled with the Supreme Court's recent decision in *Jones*").

c. Finally, the decision below conflicts with decisions of this Court and others holding that the Seventh Amendment requires the jury to resolve disputed facts underlying a legal claim before they are

separately resolved by the court in connection with an equitable or other judge-determined issue. *See Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510-11 (1959); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 470-73 (1962); *Curtis v. Loether*, 415 U.S. 189, 196 n.11 (1974). Consistent with that principle, other federal circuits have held that when the merits of a claim involve disputed facts that overlap with "threshold" issues such as jurisdiction and venue, the resolution of such common facts must be reserved for the jury. *See DDB Techs., L.L.C. v. MLB Advanced Media, L.P.*, 517 F.3d 1284, 1291 (Fed. Cir. 2008); *Torres-Negron v. J & N Records, LLC*, 504 F.3d 151, 162-63 (1st Cir. 2007); *Rosales v. United States*, 824 F.2d 799, 803 (9th Cir. 1987); *Schramm v. Oakes*, 352 F.2d 143, 149 (10th Cir. 1965); *Borg v. L & J Energy, Inc.*, 1990 WL 122225 (W.D. Mich. May 25, 1990); *Vibber v. U.S. Rubber Co.*, 255 F. Supp. 47, 50 (S.D.N.Y. 1966); *Kierulff Assocs. v. Luria Bros. & Co.*, 240 F. Supp. 640, 642 (S.D.N.Y. 1965). *See generally* 3 James Wm. Moore et al., Moore's Federal Practice § 22.01(5)(d). The decision below conflicts with these precedents because it allows—indeed requires—the court to resolve the exhaustion defense, including all underlying factual disputes, prior to any litigation on the merits, even where, as here, the facts underlying the exhaustion defense overlap substantially with the substantive allegations of wrongdoing.

The decision below, in fact, explicitly recognizes the apparent conflict with these precedents. App. 5a. In an effort to avoid the conflict, the decision takes the unprecedented step of requiring the court to make its findings first, then allowing the jury to

"reexamine" the factual findings made in connection with the affirmative defense: "[I]f there is a jury trial, the jury will make all necessary findings of fact without being bound by (or even informed of) any of the findings made by the district judge in determining that the prisoner had exhausted his administrative remedies." App. 6a. According to the decision below, policy concerns behind the PLRA simply compel this departure from this Court's established Seventh Amendment precedent: "The alternative of trying the merits before exhaustion, as under the *Beacon Theatres* line of cases, is unsatisfactory in the present setting because it would thwart Congress's effort to bar trials of prisoner cases in which the prisoner has failed to exhaust his administrative remedies." App. 5a.

The resort to PLRA policy as a justification for disregarding this Court's Seventh Amendment precedents is obviously unavailing. It is another specie of the error committed by the court in inventing a special procedure for handling the exhaustion defense, rather than abiding by the Federal Rules, as this Court unambiguously mandated in *Jones*. The asserted policy of the PLRA is no more a justification for ignoring this Court's decisions than it is for rewriting the Federal Rules of Civil Procedure.

What is more, the novel procedure proposed by the Seventh Circuit does not even succeed in its stated objective of protecting jury trial rights secured by the Seventh Amendment. The procedure does allow a jury to decide disputed facts previously resolved by the judge in deciding the exhaustion defense, but only if the judge ruled that there *was* ex-

haustion. Where the judge finds a *lack* of exhaustion and dismisses the case, by contrast, there is *no* opportunity for the jury to reexamine the judge's underlying factual findings that relate to the merits.

The inadequacy of the court's resolution illustrates the consequences of this kind of judicial ad hockery. Both the Federal Rules and this Court's Seventh Amendment precedents already establish wholly adequate and appropriate procedures for adjudicating claims and defenses fairly while protecting jury trial rights. Yet the court disregarded both and adopted its own flawed procedure for policy reasons that do not even accurately reflect PLRA policies. As explained in *Jones* and elaborated above, the PLRA exhaustion defense is *not* solely concerned with screening cases out of court at the earliest possible hour in litigation. Of course, even a well-founded grounding in policy provides no justification for a court to depart from the usual federal procedures governing affirmative defenses, as this Court expressly held in *Jones*. It is all the worse to craft and impose new procedures on the basis of misguided policy perceptions. Either way, the correct approach to adjudicating the PLRA exhaustion defense is simply to follow the rules and procedures already in place for resolving any affirmative defense. Certiorari—if not summary reversal—is warranted to make that point clear.

II. THE LOWER FEDERAL COURTS ARE IN DISARRAY OVER THE PROPER PROCEDURES FOR ADUJUDICATING THE PLRA EXHAUSTION DEFENSE

Certiorari or summary reversal is also appropriate because of the widespread conflict and uncertainty in the federal courts over the proper procedure for adjudicating the PLRA exhaustion defense—specifically, whether a jury may resolve disputed facts concerning its application. The lower courts have adopted at least three different procedural approaches, and courts across the country have expressed confusion and the need for further guidance.

1. The majority of courts adhere to the "usual procedure" called for by the Federal Rules to adjudicate the affirmative defense of exhaustion: a Rule 56(c) motion for summary judgment when appropriate on the undisputed record, with factual disputes reserved for trial. That approach has been followed by the Second, Third, Fifth, Eighth, and Tenth Circuits. *See Brownell v. Krom*, 446 F.3d 305, 310 (2d Cir. 2006) (addressing exhaustion at summary judgment); *Williams v. Beard*, 482 F.3d 637, 639 (3d Cir. 2007) (reversing grant of summary judgment on exhaustion and remanding for further proceedings); *Hinojosa v. Johnson*, 277 F. App'x 370, 379-80 (5th Cir. 2008) (addressing exhaustion at summary judgment); *Foulk v. Charrier*, 262 F.3d 687, 697-98 (8th Cir. 2001) (reviewing evidence elicited at trial as to whether prisoner exhausted available remedies); *Fields v. Okla. State Penitentiary*, 511 F.3d 1109, 1112 (10th Cir. 2007) (addressing exhaustion

at summary judgment). The Seventh Circuit was counted among this group before the opinion below. *See Dale v. Poston*, 548 F.3d 563, 564 (7th Cir. 2008) (jury trial on exhaustion after remand on appeal from summary judgment); *Kaba v. Stepp*, 458 F.3d 678, 686 (7th Cir. 2006) (reversing summary judgment on exhaustion and remanding for further proceedings).

In addition, district courts in the First and Second circuits have expressly held that because failure to exhaust is an affirmative defense under the PLRA, disputed factual issues about PLRA exhaustion must be tried to a jury, in the usual course. *See Maraglia v. Maloney*, 499 F. Supp. 2d 93, 97-98 (D. Mass. 2007) ("[D]isputed issues of fact must be resolved by the jury and not the Court."); *Lunney v. Brureton*, 2007 WL 1544629, at *10 n.4 (S.D.N.Y. May 29, 2007). These courts have rejected decisions directing factfinding by judges on the ground that they "pre-date" *Jones*, do not conform to the standard procedure of the Federal Rules, and rest on "perceived policy concerns" instead of the statutory rules. *Maraglia*, 499 F. Supp. 2d at 94; *see also Lunney*, 2007 WL 1544629, at *10 n.4 (doubting, in light of *Jones*, the validity of previous caselaw directing trial courts to resolve disputed factual issues).[2]

2. Two circuits—the Ninth and Eleventh—have expressly declined to follow the "usual practice" under the Federal Rules for adjudicating the PLRA af-

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[2] Another district court in the Second Circuit has held, however, that the exhaustion defense should be tried to the court. *See Amador v. Superintendents of Dep't. of Correctional Svcs.*, 2007 WL 4326747, at *5 (S.D.N.Y. Dec. 4, 2007).

firmative defense. These courts instead characterize exhaustion as a "matter in abatement" and hold that the exhaustion defense must be raised in an "unenumerated" Rule 12(b) motion to dismiss. *See Wyatt v. Terhune*, 315 F.3d 1108 (9th Cir. 2003); *Bryant v. Rich*, 530 F.3d 1368 (11th Cir. 2008). Because a "matter in abatement" does not go to the merits of a claim, this approach requires judges to resolve any factual disputes about exhaustion just as they would with a "jurisdictional or related type of motion." *See Ritza v. Int'l Longshoremen's & Warehousemen's Union*, 837 F.2d 365, 368 (9th Cir. 1988) (citation omitted).

The Ninth Circuit actually adopted the "matter in abatement" approach as a general method for addressing exhaustion requirements long before Congress enacted the PLRA. *See Ritza*, 837 F.2d at 368-69 (failure to exhaust intra-union remedies); *Stauffer Chem. Co. v. FDA*, 670 F.2d 106, 108 (9th Cir. 1982) (failure to exhaust intra-agency review process); *Studio Elec. Technicians Local 728 v. Int'l Photographers of Motion Picture Indus. Local 659*, 598 F.2d 551, 552 n.2 (9th Cir. 1979) (failure to exhaust remedies required by the Labor Management Relations Act). Thus, when confronted in *Wyatt* with the question of how to adjudicate the PLRA exhaustion requirement, the Ninth Circuit simply applied its existing precedent to this affirmative defense. *See* 315 F.3d at 1119-20.

But *Wyatt* was decided before this Court's decision in *Jones*, and that circuit appears not to have revisited this issue since. However, in the aftermath of *Jones*, courts have expressed doubt that *Wyatt*'s

"matter in abatement" approach remains viable. *See, e.g.*, *Percival v. Knowles*, 2007 WL 2827789, at *5 (E.D. Cal. Sept. 27, 2007) (holding "that a motion for summary judgment" and not an unenumerated Rule 12(b) motion "is the proper mechanism for resolving the question of whether plaintiff satisfied the exhaustion requirement"); *Lunney*, 2007 WL 1544629, at *10 n.4.[3]

Despite the evident conflict between the Ninth Circuit's precedent and this Court's decision in *Jones*, the Eleventh Circuit recently adopted the Ninth Circuit's approach and held that PLRA exhaustion should be adjudicated as a "matter in abatement" rather than an affirmative defense. *Bryant*, 530 F.3d at 1376. Over a vigorous dissent, the Eleventh Circuit in *Bryant* adopted the holding of the Ninth Circuit that "exhaustion should be decided on a Rule 12(b) motion to dismiss" and that because "exhaustion . . . is treated as a matter in abatement and not an adjudication on the merits, it is proper for a judge to consider facts outside of the pleadings and to resolve factual disputes." *Id.* Notably, the majority's conclusion was premised on the policy-driven determination that putting factual disputes about the affirmative defense of exhaustion to a jury would "unnecessarily undermine Congress's

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[3] Yet another district court in the Ninth Circuit has held that exhaustion should be tried to a jury, even though that circuit has adopted a contrary position. *See Baines v. Maddock*, 2007 WL 173948, at *6 (S.D. Cal. Jan. 3, 2007) (finding "a genuine issue of material fact as to whether Plaintiff exhausted his administrative remedies" and noting that "Plaintiff . . . will be exercising his right to have a jury try this issue as to exhaustion of administrative remedies at trial").

intent in enacting the PLRA's exhaustion requirement." *Id.*

The dissent in *Bryant* strongly rejected this view. It warned that the approach cannot "be reconciled with the recent Supreme Court decision in *Jones v. Bock*." 530 F.3d at 1379 (Wilson, J., concurring in part and dissenting in part). The dissent observed that the majority's (and the Ninth Circuit's) approach conflicts with "usual procedural practice by directing district courts to treat failure to exhaust not as an affirmative defense, but to consider it on a 'motion to dismiss' not enumerated in Rule 12(b)." *Id.* at 1380. "More strikingly," the dissent continued, "rather than submitting genuine issues of material fact to the jury, the majority compels district courts to decide these factual issues." *Id.* "In the context of failure to exhaust under the PLRA," the dissent emphasized, "the Supreme Court has indicated that deviations from the usual procedural practice 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.'" *Id.* at 1380 n.3 (citing 549 U.S. at 213).

3. In the decision below, the Seventh Circuit has now adopted yet a third position, by characterizing exhaustion as an "issue of judicial traffic control." The decision below expressly rejects the Ninth and Eleventh Circuits' "unenumerated" Rule 12(b) motion as a procedural vehicle for raising the affirmative defense, conceding that under *Jones* a defendant must plead failure to exhaust pursuant to Rule 8(c). App. 3a. But the decision also rejects the majority approach of simply adhering to the usual procedure under the Federal Rules for adjudicating affirmative

defenses. Rather than abide by the standard pleading, summary judgment, and trial procedure mandated by the Rules for resolving claims and defenses, the decision below mandates a distinct procedure unique to resolving a disputed PLRA defense. Under the procedure, once a PLRA exhaustion defense is pleaded by a defendant, a district judge must convene a special evidentiary hearing focusing solely on the exhaustion defense, before litigation on the merits may proceed. The judge may permit "discovery relating to exhaustion he deems appropriate." App. 6a. Then, only "[i]f and when the judge determines that the prisoner has properly exhausted his administrative remedies, the case will proceed to pretrial discovery . . . on the merits." *Id.*[4]

The Seventh Circuit is the only court of appeals thus far to categorically preclude litigation on the merits of a suit—including any discovery—pending the court's resolution of the exhaustion affirmative defense.[5]

4. Given the various approaches taken by the courts of appeals, it can be no surprise that the dis-

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[4] The Seventh Circuit's opinion adds that "if there is a jury trial, the jury will make all necessary findings of fact without being bound by (or even informed of) any of the findings made by the district judge in determining that the prisoner had exhausted his administrative remedies." App. 6a.

[5] The First Circuit, however, has on at least one occasion, without discussion, authorized a district court to find facts on the issue of exhaustion before proceeding with the merits of a prisoner's appeal. *Casanova v. Dubois*, 304 F.3d 75, 77 (1st Cir. 2002) ("We remanded this case to the district court for additional fact-finding with respect to whether the exhaustion requirement of the [PLRA] precludes the appellants' lawsuit.").

trict courts, which bear the brunt of this uncertainty, have frequently expressed a need for guidance on the proper method for adjudicating the affirmative defense of failure to exhaust available remedies. "Courts across the country are divided," one recently noted. *Singleton v. Johnson*, 2008 WL 3887633, at *1 (S.D. Ga. Aug. 18, 2008). Another court stated that "there is substantial ground for difference of opinion," yet "no guidance" on the issue. *Gilmore v. Stalder*, 2008 WL 4155332, at *2-3, *5 (W.D. La. Sept. 8, 2008); s*ee also Finch v. Servello*, 2008 WL 4527758, at *8 (N.D.N.Y. Sept. 29, 2008) (seeking special briefing on "the question of whether the disputed factual issue can be decided in a hearing or if it must be decided by a jury"); *Amador v. Superintendent of Dept. of Corr. Svcs.*, 2007 WL 4326747, at *5 n.7 (S.D.N.Y. Dec. 2, 2007) (recognizing conflicting caselaw and noting that "[i]t is unclear whether factual disputes regarding the exhaustion defense should ultimately be decided by the court or by a jury"). There is no good reason to require the district courts administering the requirements of the PLRA to remain mired in such confusion and uncertainty on such a crucial procedural issue. This Court should grant review to provide them the guidance they need.

III. THE PROPER ADJUDICATION OF THE PLRA EXHAUSTION DEFENSE IS AN IMPORTANT AND RECURRING ISSUE

1. The issue presented here is "important, both procedurally and substantively and deserve[s] further consideration." *Gilmore*, 2008 WL 4155332, at *3. The cases discussed in the previous section

indicate the frequency with which courts are faced with the question of when and how to adjudicate the PLRA exhaustion issue, and the uncertainty they face in answering it. And this Court itself has recognized that disputes about exhaustion under the PLRA "occur frequently." *Woodford*, 548 U.S. at 101 n.5.

This Court should not allow the already substantial uncertainty concerning the issue presented here to continue or, inevitably, broaden further. Although *Jones* explicitly held that the PLRA's exhaustion requirement is an affirmative defense to be adjudicated according to the "usual practice" under the Federal Rules, *see supra* at 15, three circuits have adopted two different types of special procedures to resolve the defense, neither of which reflects "usual practice" under the Rules. The district courts are rightly complaining about the lack of clear guidance on what is or should be a straightforward issue. The PLRA is specifically designed to make prisoner litigation more efficient to courts and thus more fair to all parties—including prisoners with meritorious claims. The current uncertainty over how to litigate the exhaustion defense—a crucial feature of the PLRA and a major issue in much PLRA litigation—plainly thwarts that fundamental statutory objective.

2. Beyond the adverse consequences of general uncertainty over what approach is lawful and appropriate, the specific approach adopted by the Seventh Circuit will itself have numerous adverse, and unnecessary, consequences for prisoner litigation in

courts within the Seventh Circuit, and in courts elsewhere if the approach is adopted more broadly.

First, the decision below will impose costly delays and further burden district courts. The court of appeals held that courts must immediately stay all proceedings and hold an evidentiary hearing every time exhaustion is pleaded by a defendant. App. 6a. Because a plaintiff need not demonstrate exhaustion in his complaint, *see Jones*, 549 U.S. at 212, and because a defendant must plead the exhaustion defense or risk waiver, *id.*, a defendant has every incentive to plead non-exhaustion in each case and abandon the defense only when it becomes clear that a plaintiff exhausted his administrative remedies. But this incentive of notice pleading, coupled with the Seventh Circuit's directive to resolve exhaustion before litigation may proceed, will inevitably require district courts to hold preliminary hearings on exhaustion in virtually every case governed by the PLRA.

Second, forcing courts to hold preliminary hearings in every case would severely prejudice litigants with meritorious claims. The screening requirements of 42 U.S.C. § 1997e(c) (prisoner cases) and 28 U.S.C. § 1915A (*in forma pauperis* filings) already delay by many months the actual filing of a complaint and the call for an answer. Barring merits-related litigation until after a preliminary hearing on exhaustion can easily delay even the most basic progress on a case for a year or more. And it is *meritorious* claims that will suffer the most under the Seventh Circuit's novel scheme, because defendants now have an incentive to forcefully litigate even

marginal exhaustion defenses in any case that presents a risk on the merits. This result runs contrary to Congress's stated intent in enacting the PLRA to "improve the quality of prisoner suits," *Woodford*, 548 U.S. at 94, without "prevent[ing] inmates from raising legitimate claims," *id.* at 117 (Stevens, J., dissenting).

Finally, the decision below will disrupt usual procedures for the appointment of counsel. Courts are often reluctant to appoint counsel for prisoner-plaintiffs in the early stages of litigation. *See Pruitt v. Mote*, 503 F.3d 647, 661 (7th Cir. 2007) (en banc) (Rovner, J., concurring) (noting that requests for counsel during pre-trial phases of a case are frequently denied). The usual presumptions that attach to pleadings and the prohibition on fact-finding at summary judgment allow courts to defer decisions on appointing counsel until the merits of a claim become apparent. *Id.* Forcing courts to decide whether to appoint counsel for preliminary hearings on exhaustion—well before the merits of a case come into view—will compromise their ability to efficiently deploy scarce resources. Yet without the benefit of counsel for a fact-finding hearing on exhaustion, *pro se* litigants will be at a disadvantage in gathering and presenting evidence establishing their efforts to exhaust (or establishing the prison's efforts to thwart them from doing so).

The novel procedure invented by the court of appeals might allow lower courts to more quickly dispose of some meritless prisoner claims. But it also might not. And it might well interfere with litigation of meritorious claims. What should ultimately

matter most is that "[o]ur legal system . . . remains committed to guaranteeing that prisoner claims of illegal conduct by their custodians are fairly handled *according to the law*." *Jones*, 549 U.S. at 202 (emphasis added). The decision below breaches that commitment because it does not provide for prisoner claims to be handled "according to the law," but instead according to an ad hoc structure—notably, one not designed by the legislators actually responsible for fixing the rules governing prisoner litigation. But as this Court rightly noted in *Jones*, whether the PLRA exhaustion defense should be treated differently from every other affirmative defense is a choice for Congress to make, not a court of appeals.

CONCLUSION

For the foregoing reasons, the petition should be granted, or the decision below should be summarily reversed.

Respectfully submitted,

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January 12, 2009

APPENDIX

APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 07-1426

CHRISTOPHER PAVEY,

Plaintiff-Appellee,

v.

PATRICK CONLEY, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.

No. 3:03-CV-0662-RLM-CAN

Robert L. Miller, Jr., Chief Judge.

ARGUED APRIL 9, 2008—DECIDED JUNE 5, 2008
AMENDED SEPTEMBER 12, 2008

Before POSNER, RIPPLE, and MANION, *Circuit Judges.*

POSNER, *Circuit Judge.* The question presented by this interlocutory appeal under 28 U.S.C. § 1292(b) is whether a prisoner plaintiff in a suit for damages governed by the Prison Litigation Reform Act is entitled by the Seventh Amendment to a jury

trial on any debatable factual issues relating to the defense of failure to exhaust administrative remedies. The district court answered yes.

The prisoner filed this suit under 42 U.S.C. § 1983 against guards who he claimed had used excessive force in removing him from his cell, as a result breaking his arm. In their answer the defendants claimed that the prisoner had failed to exhaust his administrative remedies because he hadn't filed a timely grievance with the prison authorities. He countered with an affidavit which stated that he had been unable to exhaust those remedies because he could not prepare the grievance himself, as he is left-handed and it was his left arm that was broken; and that he was transferred to another prison before a promised investigation of the incident was conducted, which presumably prevented him from obtaining the facts that he needed in order to be able to press a grievance effectively. The defendants respond that any factual issues relating to the defense of failure to exhaust administrative remedies should be resolved by the judge at the outset of the litigation without a jury unless of course the judge decides to convene an advisory jury.

The Prison Litigation Reform Act provides that "no action shall be brought [under federal law] with respect to prison conditions . . . by a prisoner . . . until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). The Supreme Court has held that the failure to satisfy this requirement is an affirmative defense, *Jones v. Bock*, 549 U.S. 199 (2007), which means that the plaintiff need not plead that he exhausted his administrative

remedies. Only one appellate court has weighed in on the question whether there is a right to a jury trial if genuine issues of material fact concerning compliance with the duty to exhaust are presented: in *Wyatt v. Terhune*, 315 F.3d 1108, 1119-20 (9th Cir. 2003), the Ninth Circuit held that because previous Ninth Circuit cases had held that a failure to exhaust remedies is a "matter in abatement," properly raised not by a motion for summary judgment but by a motion under Fed. R. Civ. P. 12(b) (an "unenumerated Rule 12(b) motion," the court called it), the judge must decide exhaustion even if that requires him to make findings of fact.

The Ninth Circuit's approach is not persuasive, although we agree with its result. Rule 12(b) does not say anything about who finds the facts. It just permits certain defenses, such as lack of subject-matter or personal jurisdiction, to be presented by motion rather than only in the answer to the complaint. Yet the defendants are right that not every factual issue that arises in the course of a litigation is triable to a jury as a matter of right, even if it is a suit at law (rather than in equity) within the meaning of the Seventh Amendment. The clearest example is subject-matter jurisdiction; often it turns on factual issues that may be genuinely debatable, but even if so the issues are resolved by the judge. *E.g.*, *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 188-90 (1936); *Prizevoits v. Indiana Bell Telephone Co.*, 76 F.3d 132, 134-35 (7th Cir. 1996). The same is true of factual issues relating to the defense of lack of personal jurisdiction or venue, *e.g.*, *Hyatt Int'l Corp. v. Coco*, 302 F.3d 707, 712-13 (7th Cir. 2002); *Marra v. Papandreou*, 216 F.3d 1119, 1122 (D.C. Cir.

2000)—though these defenses are not jurisdictional in the sense of requiring the judge to decide them even if the parties do not make an issue of them—and to motions to abstain in favor of another court, or an agency. *E.g.*, *Ambrosia Coal & Construction Co. v. Pages Morales*, 368 F.3d 1320, 1331-32 (11th Cir. 2004); *cf. Majors v. Engelbrecht*, 149 F.3d 709, 711 (7th Cir. 1998). A decision to relinquish supplemental jurisdiction to the state courts, *see* 28 U.S.C. § 1367, is likewise made by the judge even if there are contestable factual questions bearing on the decision.

The generalization that emerges from these examples and others that might be given is that juries do not decide what forum a dispute is to be resolved in. Juries decide cases, not issues of judicial traffic control. Until the issue of exhaustion is resolved, the court cannot know whether it is to decide the case or the prison authorities are to. In this case, should the defendants' contention that the prisoner inexcusably failed to file a timely grievance be sustained, he would no longer have any administrative remedies. But in many cases the only consequence of a failure to exhaust is that the prisoner must go back to the bottom rung of the administrative ladder; and in such a case one could envision a series of jury trials before there was a trial on the merits: a jury trial to decide exhaustion, a verdict finding that the prisoner had failed to exhaust, an administrative proceeding, the resumption of the litigation, and another jury trial on failure to exhaust. That distinguishes the issue of exhaustion from deadline issues that juries decide. A statute of limitations defense if successfully interposed ends the litigation rather than shunting

it to another forum. If the defense is rejected, the case proceeds in the court in which it is filed.

A peculiarity of this case is a possible overlap between the factual issues relating to exhaustion and those relating to the merits of the excessive-force claim. The broken arm is of course germane to both, and while the fact that it was broken is conceded, the severity of the break could well be an issue common to both the allegedly inexcusable failure to exhaust and the excessiveness of the force that caused the break. By analogy to the cases that require that claims at law be decided before equitable claims when both types of claim are presented, so that the judge's decision on the latter does not preclude or otherwise affect the jury's determination of the former, *e.g.*, *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 508-11 (1959); *Williams Electronics Games, Inc. v. Garrity*, 366 F.3d 569, 577-78 (7th Cir. 2004), we think that any finding that the judge makes, relating to exhaustion, that might affect the merits may be reexamined by the jury if—and only after—the prisoner overcomes the exhaustion defense and the case proceeds to the merits. The alternative of trying the merits before exhaustion, as under the *Beacon Theatres* line of cases, is unsatisfactory in the present setting because it would thwart Congress's effort to bar trials of prisoner cases in which the prisoner has failed to exhaust his administrative remedies. *Jones v. Bock*, *supra*; *Porter v. Nussle*, 534 U.S. 516, 523-25 (2002); *Pozo v. McCaughtry*, 286 F.3d 1022, 1025 (7th Cir. 2002). A jury might decide the merits of a case that should never have gotten to the merits stage because the judge should have found that the prisoner had failed to exhaust his administrative

remedies.

The sequence to be followed in a case in which exhaustion is contested is therefore as follows: (1) The district judge conducts a hearing on exhaustion and permits whatever discovery relating to exhaustion he deems appropriate. (2) If the judge determines that the prisoner did not exhaust his administrative remedies, the judge will then determine whether (a) the plaintiff has failed to exhaust his administrative remedies, and so he must go back and exhaust; (b) or, although he has no unexhausted administrative remedies, the failure to exhaust was innocent (as where prison officials prevent a prisoner from exhausting his remedies), and so he must be given another chance to exhaust (provided that there exist remedies that he will be permitted by the prison authorities to exhaust, so that he's not just being given a runaround); or (c) the failure to exhaust was the prisoner's fault, in which event the case is over. (3) If and when the judge determines that the prisoner has properly exhausted his administrative remedies, the case will proceed to pretrial discovery, and if necessary a trial, on the merits; and if there is a jury trial, the jury will make all necessary findings of fact without being bound by (or even informed of) any of the findings made by the district judge in determining that the prisoner had exhausted his administrative remedies.

We emphasize that in the ordinary case discovery with respect to the merits should be deferred until the issue of exhaustion is resolved. If merits discovery is allowed to begin before that resolution, the statutory goal of sparing federal courts the burden of prisoner litigation until and unless the

prisoner has exhausted his administrative remedies will not be achieved. But we do not want to place the district courts of this circuit in a straitjacket. There may be exceptional cases in which expeditious resolution of the litigation requires that some discovery be permitted before the issue of exhaustion is resolved. The present case is one in which the exhaustion issue and the merits issue share common facts (the facts relating to the gravity of the injury to the plaintiff's arm), so that discovery targeted on exhaustion may well produce evidence or leads relating to the merits.

The judgment of the district court is reversed and the case is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

SIR CHRISTOPHER R. PAVEY, Plaintiff	)	
vs.	)	CAUSE NO.: 3:03-CV-66 RM
P. CONLEY, *et al.*, Defendants	)	

OPINION AND ORDER

The defendants, by counsel, the Indiana Attorney General, filed a motion asking the court to amend its orders to permit an interlocutory appeal.

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

28 U.S.C. § 1292(b).

This is a civil rights case brought by an inmate pursuant to 28 U.S.C. § 1983. The defendants assert that the plaintiff did not exhaust his administrative remedies as required by 42 U.S.C. § 1997e(a). In reversing this court's grant of summary judgment, the court of appeals found that a genuine issue of fact existed as to the exhaustion defense, and remanded the case for further proceedings. This court entered a scheduling order setting discovery and dispositive motion deadlines. When the defendants did not answer discovery, the court granted the plaintiff's motion to compel and denied the defendants' motion to reconsider the order compelling them to answer discovery. The court then set the case for trial. These three orders give rise to the defendants' desire to take an interlocutory appeal.

Counsel for the defendant has argued unsuccessfully in several cases that the affirmative defense of failure to exhaust administrative remedies must be resolved before a defendant can be compelled to respond to discovery addressing the merits of a prisoner plaintiff's claims. They further contend that when a genuine issue of fact exists as to the exhaustion defense, that question must be resolved before the presentation of any other evidence. Finally, they assert that where a genuine issue of fact exists as to the exhaustion defense, that question of fact must be resolved by the judge and not by a jury.

Counsel for the defendant appears to recognize that these assertions are not consistent with the standard procedures for conducting a federal trial and acknowledges that no controlling authority

exists on these questions. Nevertheless, counsel argues that these deviations from normal trial procedure are required by the mandate that "No action shall be brought with respect to prison conditions . . . by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a).

These are controlling questions of law. "As these are questions of first impression, the application of these statutes to the facts alleged here is certainly contestable, and the resolution of these issues will facilitate the conclusion of the litigation." *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000, 1007-1008 (7th Cir. 2002).

But for an interlocutory appeal, these questions (which have been raised in other cases as well) would almost always escape appellate review. Because of the far-reaching impact on prisoner litigation that these new interpretations would impose, and because of the frequency and forcefulness with which they have been presented by the Indiana Attorney General, the court is persuaded that it is appropriate to permit the defendants to seek an interlocutory appeal on these questions.

For the foregoing reasons, the court:

(1) GRANTS the motion (Docket No. 85);

(2) AMENDS this court's orders of November 16, 2006 (Docket No. 80), November 16, 2006 (Docket No. 81), and November 21, 2006 (Docket No. 84) to add the following paragraph to each:

Pursuant to 28 U.S.C. § 1292(b), the court certifies these three questions for interlocutory appeal:

> 1. Whether 42 U.S.C. § 1997e(a) precludes discovery addressing the merits of a prisoner plaintiff's claims until after the resolution of the affirmative defense of failure to exhaust administrative remedies.
>
> 2. Whether 42 U.S.C. § 1997e(a) requires that genuine issues of fact related to the affirmative defense of exhaustion of administrative remedies must be resolved before the presentation of any other evidence at trial.
>
> 3. Whether 42 U.S.C. § 1997e(a) requires that genuine issues of fact related to the affirmative defense of exhaustion of administrative remedies must always be resolved by a judge and not by a jury.

and,

(3) ORDERS that these amended orders be deemed entered as of this date for purposes of computing the time for filing a petition for permission to appeal pursuant to 28 U.S.C. § 1292(b).

SO ORDERED.

ENTERED: December 14 , 2006

/s/ Robert L. Miller, Jr.
Chief Judge
United States District Court

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

SIR CHRISTOPHER R. PAVEY,	)	
Plaintiff	)	CAUSE NO.:
vs.	)	
	)	3:03-CV-66 RM
P. CONLEY, *et al.*,	)	
Defendants	)	

OPINION AND ORDER

The defendants, by counsel, move to reconsider two of this court's prior orders. It is appropriate for the court to begin where the defendants' brief ends. On March 3, 2006, the court of appeals issued its order reversing this court's grant of summary judgment. Nineteen days later, on March 22, Christopher R. Pavey, a *pro se* prisoner, signed an untimely jury demand. More than three months later, on July 31, the defendants moved to strike that jury demand arguing that it was more than two years late. When the Magistrate Judge denied that motion, they filed a motion to reconsider, which was also denied. Though the Magistrate Judge did not cite FED. R. CIV. P. 39(b) in either of his rulings, it is clear that he exercised the discretion conferred by that rule to order a jury trial. Though the defendants did not file an objection pursuant to FED. R. CIV. P. 72(a), and though they acknowledge that "they may not now assign error to that ruling as matter of right" (Docket No. 83 at 15), they

nevertheless, ask the court to distinguish the Magistrate Judge's ruling from a prior ruling by the undersigned judge in a different case. This court declines to attempt to render an advisory analysis distinguishing the discretion exercised by two different judges in two different cases.

Returning to the primary focus of the defendants' brief, they argue that disputed issues of fact related to their affirmative defense of exhaustion should be tried to the court rather than to a jury. They concede that there is no binding precedent addressing this specific affirmative defense, but such a narrow focus is unnecessary. Neither their brief nor any of their cited cases squarely address the fundamental principle of federal law that "federal policy favor[s] jury decisions of disputed fact questions . . . ." *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 538 (1958).

The defendants argue that the judge should resolve the fact questions related to the affirmative defense of exhaustion because Congress wanted to reduce prisoner litigation. It is unnecessary for this court to address either Congressional intent or even Congressional authority in regard to depriving inmates of their right to a jury determination since the PLRA did not expressly speak to this question. Without an unequivocal statute clearly denying the right to a jury, the presumption is that fact questions are resolved by juries. "Although district courts are expert in finding facts, at the summary judgment stage disputed facts must be reserved for the jury." *Nike, Inc. v. "Just Did It" Enterprises*, 6 F.3d 1225, 1233 (7th Cir. 1993) (holding that the

affirmative defense of parody is a jury question in a trademark case.); *see also Europlast, Ltd. v. Oak Switch Sys.*, 10 F.3d 1266 (7th Cir. 1993) (holding that it was proper for the jury to resolve a disputed issue of fact related to an affirmative defense involving insolvency in a contract and tort case.), and *Campbell v. Nordco Products*, 629 F.2d 1258 (7th Cir. 1980) (holding that the jury should resolve a disputed issue of fact related to an affirmative defense involving assumption of the risk.).

Though the defendants question the applicability of *Byrd v. Blue Ridge*, that case demonstrates the strength of the federal presumption of jury adjudications. *Byrd* involved the adjudication of a state law statutorily created cause of action which afforded no jury trial right. Yet neither an unambiguous precedent, nor principles of comity were sufficient to overcome the Supreme Court's stated presumption of jury determinations of disputed facts in federal court.

> The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence -- if not the command -- of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury.

Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 537 (1958) (footnote omitted). Though the defendants argue that this case is a constitutional, rather than a statutory or common-law claim, there is no logic in

arguing that constitutional claimants should be denied the right to a jury trial while lesser claimants are afforded it.

Further, the defendants argue that the exhaustion question must be resolved before the court may proceed any further with this lawsuit. They argue that because the PLRA states that "No action shall be brought . . . by a prisoner . . . until such administrative remedies as are available are exhausted" 42 U.S.C. § 1997e(a), that not even discovery related to the merits of the case can occur. To the extent possible, that has already happened in this case. Discovery was stayed and the defendants filed a summary judgment motion. Because exhaustion is an affirmative defense, the burden was on the defendants and it has been determined that they did not carry their burden because a genuine issue of fact exists. Now it is time for this case to proceed because, though it is still necessary to determine whether the plaintiff exhausted his administrative remedies, the time for making that determination shifted when the defendants lost on summary judgment. The defendants might yet prevail on their exhaustion defense, but to do so they must convince the fact finder, in this case a jury, to resolve those disputed issues of fact in their favor. The time for presenting affirmative defenses to the jury is no different in this case than it is in any other: after the plaintiff has rested his case in chief.

Before trial, the plaintiff is entitled to conduct discovery. In this case the plaintiff has outstanding discovery that went unanswered for six months. The motion to compel was granted and the defendants

were ordered to respond to the discovery on or before December 15, 2006.

For the forgoing reasons, the motion to reconsider (Docket No. 82) is **DENIED**.

SO ORDERED.

ENTERED: November 21, 2006

/s/ Robert L. Miller, Jr.
Chief Judge
United States District Court

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

SIR CHRISTOPHER R. PAVEY,	)	
Plaintiff	)	CAUSE NO.:
vs.	)	
	)	3:03-CV-66 RM
P. CONLEY, *et al.*,	)	
Defendants	)	

ORDER

Christopher Pavey, a *pro se* prisoner, filed a motion to compel responses to his discovery filed on June 21, 2004. Then in 2004, discovery was stayed pending resolution of a pending a summary judgment motion that was ultimately granted. The case was appealed and on March 27, 2006, the circuit issued its mandate vacating the judgment and remanding the case. The defendants did not challenge that ruling and thus ended the discovery stay. Nevertheless, the defendants did not respond to the outstanding discovery request.

The defendants' response to the motion to compel states that "[t]he plaintiff has not, since then, contacted the defendants' counsel with respect to discovery except to serve counsel with a copy of his motion to compel." Docket No. 79 at 1. Nevertheless, since *pro se* parties are not required by N.D. Ind.

L.R. 37.1(c) to initiate an informal conference before filing a motion to compel, this is irrelevant.

The defendants' note that they have not abandoned their affirmative defense of exhaustion and that the court has not set an evidentiary hearing on that issue. Therefore, they argue that the justification for a stay is as valid now as it was when it was entered in 2004. The prior stay unquestionably expired and the defendants haven't sought nor obtained another one. More critically here, a stay is no longer appropriate and there is no basis for an evidentiary hearing on the affirmative defense of exhaustion. The court of appeals has determined that there is a genuine issue of fact as to the exhaustion defense. "[F]ederal policy favor[s] jury decisions of disputed fact questions . . . ." *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 538 (1958).

> The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence–if not the command–of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury.

Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 537 (1958) (footnote omitted). Therefore, while it is true that the defendants retain their exhaustion affirmative defense (along with any other affirmative defenses that were properly raised) the place for

presenting those defenses is to the jury, and the time for doing so is after the plaintiff has rested his case in chief.

Finally, the defendants ask that the court deny the motion to compel because they are looking for some documents. A voluntary effort to respond to some of the plaintiff's discovery is insufficient. The discovery stay expired on March 27, 2006 and counsel should have responded to the outstanding discovery within 30 days thereafter. Six months have now passed since this discovery was due. The plaintiff is entitled to receive a response to his discovery before proceeding to trial.

For the foregoing reasons, the motion to compel (Docket No. 78) is GRANTED and the defendants are ORDERED to respond to the plaintiff's discovery request (Docket No. 25) on or before December 15, 2006.

SO ORDERED.

ENTERED: November 16 , 2006

/s/ Robert L. Miller, Jr.
Chief Judge
United States District Court

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

SIR CHRISTOPHER R. PAVEY,	)	
Plaintiff	)	CAUSE NO.:
vs.	)	
	)	3:03-CV-66 RM
P. CONLEY, *et al.*,	)	
Defendants	)	

ORDER

All of the scheduling deadlines in this case having passed, it is time to set this case for a jury trial. Therefore this court now schedules this case for a **4 day trial by jury** commencing at 9:30 a.m. South Bend time, on **April 2, 2007**. The plaintiff shall be present for the trial with all of his legal paperwork, but inmate witnesses shall testify by videoconferencing if such technology is available.

The court schedules the **final pretrial conference** for 1:00 o'clock p.m. South Bend time on **March 13, 2007**. The final pretrial conference shall be conducted by videoconferencing if such technology is available.

Defense Counsel shall prepare and submit the **proposed final pretrial order** signed by all counsel of record and all unrepresented parties on or before **February 20, 2007**. The plaintiff and defendants shall **file and exchange** their contentions, witness and exhibit lists on or before **January 19, 2007**. If the plaintiff does not file and serve his lists within the time allowed, the court may dismiss the case. The lists must include the names and addresses of any and all witnesses the plaintiff intends to call to testify at the time of trial (regardless of whether subpoenas or orders to produce have been requested for such witnesses), a statement of all the plaintiff's contentions, and a description of any and all exhibits which he may seek to introduce into evidence at the time of trial.

Any motions in limine shall be filed by **February 20, 2007**, together with appropriate memoranda citing points and authorities. The parties may raise as many issues in a motion in limine as the case makes appropriate, but may only file one motion. Oral motions in limine will be allowed only for good cause shown. Motions should identify the evidence at issue with specificity

By **February 20, 2007**, the parties must file any proposed jury instructions (identifying the source and/or supporting authority for each proposed instruction). Any written objections to jury instructions shall be filed by **March 12, 2007**. The court has its own standard instructions on burden of proof, credibility of witnesses and deliberations.

SO ORDERED.

ENTERED: November 16, 2006

/s/ Robert L. Miller, Jr.
Chief Judge
United States District Court

APPENDIX F

UNPUBLISHED ORDER
Not to be cited per Circuit Rule 53

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

Submitted February 1, 2006*
Decided March 3, 2006

BEFORE

Hon. RICHARD A. POSNER, *Circuit Judge*

Hon. KENNETH F. RIPPLE, *Circuit Judge*

Hon. DANIEL A. MANION, *Circuit Judge*

No. 05-2004

CHRISTOPHER R. PAVEY, *Plaintiff-Appellant*	Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.
vs.	No. 03 C 662

* After an examination of the briefs and the record, we have concluded that oral argument is unnecessary. Thus, the appeal is submitted on the briefs and the record. *See* Fed. R. App. P. 34(a)(2).

P. CONLEY, R. WATTS, GROTT, et al.,
Defendants-Appellees.

Robert L. Miller, Jr.,
Chief Judge

ORDER

Indiana inmate Christopher Pavey brought suit under 42 U.S.C. § 1983. He claimed that six guards used excessive force in violation of the Eighth Amendment when they broke his arm during a cell extraction. The district court granted summary judgment for the guards on the ground that Mr. Pavey had failed to exhaust his administrative remedies as required by 42 U.S.C. § 1997e(a). For the reasons set forth in this order, we vacate the judgment of the district court and remand for further proceedings.

Mr. Pavey alleges that six guards at the Maximum Control Facility ("MCF") in Westville, Indiana, broke his arm on October 14, 2001. Mr. Pavey outlined the facts surrounding the incident in his form complaint and attached a "Notice of Tort Claim." *See* R.3. He verified both documents. According to Mr. Pavey, after he argued with Sergeant Conley about recreation and shower privileges, Sergeant Conley summoned a cell extraction team. At approximately 10:00 a.m., five guards in riot gear responded and entered Mr. Pavey's cell along with Sergeant Conley and two other guards designated to observe and videotape the procedure. Mr. Pavey further alleges that once inside, Sergeant Conley and the members of the extraction team beat Mr. Pavey and broke his left arm twice. The nursing staff bandaged Mr. Pavey's arm and gave him pain killers immediately following

the altercation, but not until 4:00 a.m. the next morning did prison staff respond to Mr. Pavey's repeated requests to see a lieutenant or captain. When a lieutenant finally arrived, Mr. Pavey "informed him of the situation" and was told that the lieutenant "would check into it." R.3, Attachment at 11. Five hours later, at approximately 9:00 a.m., Mr. Pavey was transported to another prison where his arm was x-rayed and put in a cast. When he returned to MCF later that day, a major and another lieutenant interviewed him "about the events of the previous day" and photographed his injuries. *Id.* He was then returned to his cell and left there until October 19 when he was transported to a hospital in Indianapolis for surgery. His arm was repaired surgically with a metal plate and six screws. On October 24, he was transferred to Pendleton Correctional Facility. Mr. Pavey says he filed a grievance at Pendleton on January 15, 2002, "when he was able" to write again, but was told that his grievance was too late because it should have been filed at MCF. R.3 at 4.

Mr. Pavey named as defendants a number of MCF employees, including Sergeant Conley and the five members of the extraction team. He claimed that Sergeant Conley and the extraction team used excessive force and that MCF medical staff were deliberately indifferent by failing to treat properly his arm for five days after the break. He also claimed that the beating was retaliation for filing previous grievances and that his due process rights were violated because the guards tasked with observing the cell extraction did not videotape or otherwise document what happened.

At initial screening under 28 U.S.C. § 1915A(a), the district court allowed Mr. Pavey's excessive-force claim to go forward against Sergeant Conley and the members of the extraction team, but dismissed all other claims and defendants. The court reasoned that none of Mr. Pavey's other theories stated a claim for relief. *See* 28 U.S.C. 1915A(b)(1).

Four of the remaining defendants (it appears that the other two never were served properly) later moved for summary judgment on the sole basis that Mr. Pavey had failed to exhaust his administrative remedies as required by § 1997e(a). In support of this argument, the defendants submitted the declaration of an administrative assistant to the MCF grievance officer. The administrative assistant explains in her declaration that inmates generally have 48 hours (excluding weekends and holidays) to submit a grievance. She also states that, if Mr. Pavey had submitted a grievance about the cell extraction, copies would have been in both the grievance officer's file and in his institutional file; she found no relevant grievance in either location, and thus she concluded that none had been submitted at MCF. Finally, she says, "at the least an investigation would have been conducted" had Mr. Pavey submitted a grievance. R.31, Attachment 1 (Declaration of Pam Bane) at 3 ¶ 17.

In response, Mr. Pavey argued that he had exhausted the administrative remedies available to him. He maintained that he could not submit a written grievance until January 15, 2002, because he is left-handed and was unable to write with his injured arm. He filed a grievance at Pendleton, he

said, as soon as he was able to write again. Moreover, Mr. Pavey explained, he verbally complained, which led to an investigation the day after the incident during which the major and lieutenant interviewed him and took photographs of his injuries. Mr. Pavey noted that he served the defendants with a discovery demand for their records of this investigation but was thwarted when the district court granted the defendants' motion to stay discovery pending resolution of their motion for summary judgment.[1]

The defendants replied to Mr. Pavey's response, attaching the declaration of the MCF grievance officer. She asserts in her declaration that Mr. Pavey's broken arm would not have prevented him from filing a timely grievance at MCF. This is so, according to the grievance officer, because Procedure 00-02-301, section XIV, of the Indiana Department of Correction Administrative Procedures permits inmates to obtain assistance in writing complaints from other inmates or staff members. That provision states:

> The complaint must be submitted by the offender on his/her own behalf. One offender may not submit a complaint on behalf of another offender nor are "class action" complaints acceptable. However, staff or another offender may assist an offender who

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[1] Two days before the deadline for the defendants to respond to Mr. Pavey's document request, they moved to stay discovery pending a decision on their motion for summary judgment. The district court granted the requested stay, reasoning that none of the documents Mr. Pavey sought in discovery were relevant to whether he had exhausted his administrative remedies.

> cannot write a complaint/grievance/appeal him/herself by writing the complaint/grievance/appeal for the offender. The complaint shall explain how the situation or incident affects the offender personally.

That same section also states: "All complaints, grievances and appeals shall be signed and dated by the offender. Signatures may be waived when the offender has transferred, does not know how to write, or is physically unable to write either by restraint or infirmity (disability)." In addition to arguing that Mr. Pavey's broken arm did not render the grievance process unavailable, the defendants also attacked Mr. Pavey's assertion that he satisfactorily grieved the cell extraction because his verbal complaints led to an investigation. The defendants argued that even if Mr. Pavey "gain[ed] the attention of people who would have reviewed a grievance if he'd grieved, and [got] a result similar to what he feels he might have gotten if he grieved," the exhaustion requirement demanded that he specifically follow the grievance procedures in place at MCF, which meant filing a written grievance. R.41 at 5. The defendants said nothing about the alleged investigation; they neither denied that it took place or explained what may have prompted prison officials to question Mr. Pavey.

The district court granted summary judgment in favor of all six guards. Although "[t]aking as true all of the facts given" by Mr. Pavey, the court accepted the defendants' reasoning and held that Mr. Pavey had failed to exhaust the grievance process and that his inability to write did not excuse that omission. R.42 at 5. Mr. Pavey challenges only this ruling on appeal and does not contest the § 1915A

dismissal of his other claims. He essentially restates his position at summary judgment: He could not write because of his broken arm, so he grieved to "anyone who would listen" and wrote a complaint as soon as he could in January 2002.[2] Appellant's Br. at 5.

We review the application of § 1997e(a) de novo. *Conyers v. Abitz*, 416 F.3d 580, 584 (7th Cir. 2005). We have held that "[t]o exhaust remedies, a prisoner must file complaints and appeals in the place, and at the time, the prison's administrative rules require." *Pozo v. McCaughtry*, 286 F.3d 1022, 1025 (7th Cir. 2002). Lack of exhaustion, however, is an affirmative defense that a defendant has the burden of proving. *Brengettcy v. Horton*, 423 F.3d 674, 682 (7th Cir. 2005); *Dale v. Lappin*, 376 F.3d 652, 655 (7th Cir. 2004) (per curiam). And where the record establishes disputed issues of fact on the question, that burden has not been met. *See Curtis*

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[2] Because in his brief Mr. Pavey discusses only the dismissal of his excessive force claim, he has waived any contention that the district court erred in holding that his complaint does not also state claims for retaliation, for a denial of due process in connection with the failure to videotape adequately and document the cell extraction, and for deliberate indifference to the injuries he sustained. *See Hentosh v. Herman M. Finch Univ. of Health Scis./The Chicago Med. Sch.*, 167 F.3d 1170, 1173 (7th Cir. 1999) (arguments not raised in opening brief are waived); *Provident Sav. Bank v. Popovich*, 71 F.3d 696, 699-700 (7th Cir. 1995) (pro se appellants are subject to the same waiver rules as represented parties). Accordingly, we have no occasion to assess the propriety of the district court's dismissal of these other claims at the screening stage. Nor do we consider whether Mr. Pavey's argument that he exhausted his excessive-force claim applies to his other claims.

v. Timberlake, No. 05-1239, 2005 WL 3728794, at *2 (7th Cir. Jan. 27, 2006); *Dale*, 376 F.3d at 656. We conclude that this is such a case.

Like the district court, we accept Mr. Pavey's declarations as true at this stage of the case. Mr. Pavey's evidence establishes that, within 48 hours of his injury, he verbally complained, first to a lieutenant who promised to investigate, and second to a major and another lieutenant who summoned Mr. Pavey, questioned him about the episode and photographed his injuries. The grievance procedure cited by the defendants specifically allows inmates who cannot write to get another inmate *or* a staff member to assist them in preparing grievances. The procedure does not require that the inmate sign his grievance. Therefore, if the major or the lieutenants memorialized Mr. Pavey's complaint in writing and passed it along for investigation, Mr. Pavey may well have done all that literally was necessary to comply with the grievance procedure.

The defendants never have denied that the incident was investigated, and at summary judgment they remained silent as to what transpired during the investigation and what prompted it. Neither have the defendants ever asserted—and certainly they offered no evidence—that Mr. Pavey's complaints to the major and lieutenants were not reduced to writing. Instead, the defendants opposed Mr. Pavey's efforts to obtain discovery of records documenting their investigation of his allegations. Now they offer the unsatisfactory argument that Mr. Pavey's complaints could not have met the exhaustion requirement of § 1997e(a) because, even if he "gain[ed] the attention of people who would

have reviewed a grievance" and prompted exactly the same investigation that a grievance would have generated, he still did not put his complaint in writing. R.41 at 5. This contention misses the point. Mr. Pavey's inability to write during the allotted two days was undisputed, as was his declaration that he was locked in his cell for that entire period except when he was receiving medical care or was with the major or lieutenants complaining about the very events underlying this lawsuit. If there was to be a written grievance, then it had to be written for Mr. Pavey by the officers who interviewed him. He did not have to write it himself; he did not have to review it; and he did not have to sign it. Thus, as Mr. Pavey suggests, there may be a writing that would qualify as a grievance in the documents he demanded but never obtained during discovery, and the defendants have yet to explain why his oral account of the cell extraction, as memorialized by the officers who interviewed him, would not literally satisfy section XIV of Procedure 00-02-301. Having left these questions unresolved, the defendants did not meet their burden of establishing the absence of a material dispute concerning their affirmative defense of failure to exhaust.

Moreover, even if the MCF officers did not produce a grievance on Mr. Pavey's behalf by writing down his account of the cell extraction, there still remains the question whether Mr. Pavey reasonably believed that he had done all that was necessary to comply with Procedure 00-02-301. We have held that inmates may rely on the assurances of prison officials when they are led to believe that satisfactory steps have been taken to exhaust administrative remedies. *See Curtis*, 2005 WL 3728794, at *3. In

Curtis the defendant jail guards argued that the plaintiff inmate had failed to exhaust his administrative remedies because he hand delivered a grievance to a jail employee instead of placing it in a lockbox designated for that purpose. In overturning the grant of summary judgment for the defendants, we observed that the defendants had offered no evidence to dispute the inmate's testimony that hand-delivery was an encouraged alternative to use of the lockbox. As we explained, prison officials who "encourage, or even invite, noncompliance with written procedure" cannot then turn around and use the deviation as evidence of a failure to exhaust. *Id.* In reaching this conclusion, we joined other circuits which have held that prison officials will be bound by their oral representations to inmates concerning compliance with the grievance process. *See Brown v. Valoff*, 422 F.3d 926, 937 (9th Cir. 2005) (stating that information prison officials provided to prisoner about grievance procedures was relevant in deciding whether available administrative remedies had been exhausted); *Brown v. Croak*, 312 F.3d 109, 112 (3d Cir. 2002) (holding that prisoner's noncompliance with written grievance procedures did not constitute a failure to exhaust since prison officials had told him that written procedures were not accurate). Mr. Pavey's situation is similar; even if the MCF officers did not generate what *they* meant to be a grievance that satisfied section XIV of Procedure 00-01-003, they still did not establish that Mr. Pavey, who could not write his own grievance and did not have access to help from his fellow inmates, did not reasonably rely on the assurance that his excessive-force allegations would be investigated.

We make one final observation. Section 1997e(a) may prove to be irrelevant if further development of the record shows that prison officials rendered the established grievance procedures unavailable to Mr. Pavey by lending him no assistance in creating what would qualify as a written grievance while at the same time isolating him from other inmates who might have assisted him. Mr. Pavey always has insisted--and the defendants never have denied--that he was confined to his cell in pain continuously for several days after his arm was broken except when he was taken for medical treatment or was in the presence of the major or two lieutenants. If so, then he lacked access to other inmates who might have written a grievance for him. We have stated that, when inmates cannot comply with grievance procedure without essential help from prison officials and that assistance is withheld, the failure of the officials to facilitate the grievance process effectively renders administrative remedies unavailable. *See Dale*, 376 F.3d at 656 (vacating grant of summary judgment for defendants on failure-to-exhaust defense where inmate submitted evidence that prison officials failed to respond to his requests for required grievance forms); *Lewis v. Washington*, 300 F.3d 829, 833 (7th Cir. 2002) (holding that administrative remedies are unavailable if prison officials fail to respond to prisoners' grievances); *see also Abney v. McGinnis*, 380 F.3d 663, 667 (2d Cir. 2004) (holding that defendants are "estopped from raising non-exhaustion as an affirmative defense when prison officials inhibit an inmate's ability to utilize grievance procedures"); *Mitchell v. Horn*, 318 F.3d 523, 529 (3d Cir. 2003) (holding that district court erred in dismissing inmate's complaint for failure to

exhaust administrative remedies when court did not address inmate's allegation that prison officials failed to provide necessary grievance forms); *Miller v. Norris*, 247 F.3d 736, 740 (8th Cir. 2001) (explaining that grievance process "is not an 'available' remedy under § 1997e(a)" if prison officials prevent its use). The defendants, therefore, have not established on this record that Mr. Pavey had an available administrative remedy during the relevant period.

Because the defendants did not establish the absence of material issues of fact concerning the exhaustion question, we conclude that it was error to grant summary judgment in their favor. Accordingly, the judgment is vacated, and the case is remanded for further proceedings on Mr. Pavey's excessive-force claim.

VACATED; REMANDED

APPENDIX G

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

September 12, 2008
Before
Hon. Richard A. Posner, *Circuit Judge*
Hon. Kenneth F. Ripple, *Circuit Judge*
Hon. Daniel A. Manion, *Circuit Judge*

No. 07-1426

CHRISTOPHER R. PAVEY,
Plaintiff-Appellee,
v.
PATRICK CONLEY, ROBERT WATTS, LAURENCE GROTT, et al.,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.
No. 03 C 662
Robert L. Miller, Jr., *Chief Judge*.

ORDER

On July 21, 2008, plaintiff-appellee filed a petition for rehearing with suggestion for rehearing en banc, and on August 13, 2008, defendants-appellants filed an answer to the petition. All the judges on the original panel have voted to deny the petition, and none of the judges in regular active service has requested a vote on the petition for rehearing en banc. The petition is therefore **DENIED**.